(1) Supreme Court, U.S.
04-975 JAN 14 2005
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

KAREN LEWIS,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JULIAN R. MURRAY, JR.
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QUESTIONS PRESENTED

1. Whether the holding in *Blakely v. Washington* is applicable to the Federal Sentencing Guidelines?

2. If so, does it apply to cases on appeal challenging the constitutionality of an increase of sentence based on facts not charged in the indictment and not submitted to the jury?

LIST OF PARTIES

1. Karen Lewis, petitioner

2. United States of America, respondent

3. Julian R. Murray, Jr., Defense Attorney
Chehardy, Sherman, Ellis, Breslin, Murray,
Recile & Griffith, L.L.P.
One Galleria Boulevard, Suite 1100
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4. Richard B. Roper, United States Attorney
Susan Cowger, Assistant U.S. Attorney
1100 Commerce Street, Third Floor
Dallas, Texas 75242-1699

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PETITION FOR A WRIT OF CERTIORARI TO THE
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PETITION FOR WRIT OF CERTIORARI

The petitioner, Karen Lewis, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals is reported in *United States v. Karen Lewis*, 108 Fed. Appx. 983 (5th Cir. 2004), Appendix A, *infra.*

JURISDICTION

The judgment of the Court of Appeals was entered on September 22, 2004. A petition for rehearing was denied on October 19, 2004. Appendix B, *infra.* Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Supreme Court Rule 10.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy .....trial, by an impartial jury of the State and district wherein the crime shall have been committed, ...; to be confronted with the witnesses against him, ...

STATEMENT OF THE CASE

Petitioner, Karen Lewis was convicted in the United States District Court for the Northern District of Texas of laundering monetary instruments, as a result of an undercover operation by federal agents. At the conclusion of the $20,000 transaction with the undercover agent, he said, "next time we'll do 500." The defendant supposedly said, "yeah," and based upon that alleged statement, the probation officer recommended that she be sentenced based upon money laundering of $520,000 rather than the $20,000 alleged in the indictment. As a result, Karen Lewis' sentence was increased by three and a half (3 1/2) years.

Karen Lewis appealed to the Unites States Fifth

Circuit Court of Appeals. While on appeal, this Court's decision in *Blakely v. Washington* 124 S.Ct. 2531 (2004) was handed down. However, the Fifth Circuit had held in *United States v. Pineiro*, 377 F.3d 464 (5th Cir. 2004) that *Blakely* was not applicable to the Federal Sentencing Guidelines, and therefore denied relief to Ms. Lewis. Petitioner filed for rehearing noting that the very issue was before this Court in the cases of *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004) cert. granted 73 USLW 3073, and *Fanfan v. United States*, 2004 WL 1723114 (D.Me. 2004) cert. granted 73 USLW 3074, and requested that the decision be delayed until *Booker* and *Fanfan* were decided. However, Lewis' Petition for Rehearing was denied on October 19, 2004.

BASIS FOR JURISDICTION IN COURT OF APPEALS

Jurisdiction before the Court of Appeals was pursuant to 28 U.S.C. § 1291, and 18 U.S.C. § 3742.

REASONS FOR GRANTING THE PETITION

This case is appropriate for certiorari review because the Fifth Circuit Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court. The Court's decision in *Blakely v. Washington, supra*, has called into doubt the validity and constitutionality of federal sentences based upon facts not submitted to a jury for determination beyond a reasonable doubt. Furthermore, the Fifth Circuit's decision in this case is in conflict with the decisions of other Unites States Courts of Appeal regarding the same issue.

e.g. *United States v. Booker*, 375 F.3d 508 (7th Cir. 2004); *Fanfan v. United States*, 2004 WL 1723114 (D.Me. 2004); See also *United States v. Penaranda*, 375 F.3d 238 (2nd Cir. 2004).

ARGUMENT AND AUTHORITIES

This Court has consistently held that the maximum sentence a judge may impose on a defendant must be based on facts reflected in the jury verdict or admitted by the defendant. See *Blakely*, 124 S.Ct. at 2537, *Apprendi v. New Jersey* 530 U.S. 466 (2000). Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. *Apprendi*, 530 S.Ct. at 490.

As in *Blakely*, Ms. Lewis has been deprived of her liberty based on issues not presented to the jury for its determination. The trial judge sentenced Ms. Lewis based on a statement made by her probation officer indicating that she supposedly intended to launder an additional $500,000. This specific issue, which was vital to the length of sentence, was never presented to the jury for its determination. Like *Blakely*, she was deprived of her constitutional right, guaranteed by the Sixth Amendment, to have the trier of fact decide all issues relevant to the duration of her sentence.

CONCLUSION

Karen Lewis respectfully requests that this Court apply the holding of Blakely to the Federal Sentencing Guidelines, requiring that all issues relevant to a defendant's

sentence be submitted to the jury for its determination. Petitioner files this petition to protect her rights in the event that the Court should rule that *Blakely* applies to the Federal Sentencing Guidelines and covers cases that are pending at the time the decision is rendered. If so, petitioner prays that her case be remanded with instructions that she be sentenced based only upon facts found beyond a reasonable doubt by the jury.

Respectfully Submitted,

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Counsel for Karen Lewis

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-10102
Summary Calendar

Filed
September 22, 2004

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KAREN LEWIS,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:03-CR-201-ALL-A

Before EMILIO M. GARZA, DeMOSS, and CLEMENT, Circuit Judges.

PER CURIAM: *

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Karen Lewis appeals her conviction of laundering monetary instruments in violation of 18 U.S.C. § 1956(a)(3). We affirm.

Lewis argues that the district court plainly erred in disallowing the playing of surveillance tapes in favor of admitting the transcripts. Lewis has not shown that there was plain error. See United States v. Reyes, 300 F.3d 555, 558 (5th Cir. 2002).

Lewis complains that the district court plainly erred in excluding the testimony of a polygraph examiner. There was no plain error, as the record indicates that Lewis failed to establish that the examiner's testimony was relevant and that polygraph exams were accepted in the scientific community. See United States v. Posado, 57 F.3d 428, 432 (5th Cir. 1995); FED. R. EVID. 702.

Lewis next asserts that the district court erred in limiting the cross-examination of Government witnesses and the time for closing argument. Lewis has not shown that these rulings constituted plain error. See United States v. Gray, 105 F.3d 956, 963-64 (5th Cir. 1997).

Lewis asserts that the district court clearly erred in finding that Lewis participated in the laundering of $520,000 for sentencing purposes. Lewis has not shown clear error. See United States v. Gillyard, 261 F.3d 506, 510 (5th Cir. 2001). For the first time in her reply brief, Lewis relies upon Apprendi v. New Jersey, 530 U.S. 466 (2000) and Blakely v. Washington, 124 S. Ct. 2531 (2004) and argues that the jury,

not the district court, must determine whether she was responsible for laundering $520,000. This court will not address the Apprendi argument, as Lewis did not raise it in her initial appellate brief. See Cousin v. Trans Union Corp., 246 F.3d 359, 373 n.22 (5th Cir. 2001). Although Blakely was not decided at the time Lewis filed her initial brief on appeal, her argument is foreclosed by this court's recent opinion in United States v. Pineiro, ___ F.3d ___, No. 03-30437, 2004 WL 1543170, *1 (5th Cir. July 12, 2004).

Lewis also argues that her trial counsel was ineffective for failing to raise objections to the district court rulings admitting transcripts of surveillance tapes, excluding the testimony of her expert witness, limiting the cross-examination of Government witnesses, refusing to continue closing argument, and limiting the time allowed for closing argument. We generally do not resolve claims of ineffective assistance of counsel on direct appeal because the record is rarely sufficiently developed. See United States v. Bounds, 943 F.2d 541, 544 (5th Cir. 1991) . The record is insufficient for us to consider Lewis's claims on direct appeal. See id. Accordingly, the judgment of conviction is AFFIRMED without prejudice to Lewis's right to raise her ineffective assistance of counsel claims in a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. We express no view on the merits of such a motion.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-10102

Filed
Oct 19 2004

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

KAREN LEWIS

Defendant - Appellant

Appeal from the United States District Court for the
Northern District of Texas, Fort Worth

ON PETITION FOR REHEARING

Before GARZA, DeMOSS, and CLEMENT, Circuit Judges.
PER CURIAM:

IT IS ORDERED that the petition for rehearing is ***denied.***

ENTERED FOR THE COURT:

/s/ Emilio M. Garza
United States Circuit Judge
REHG-2

(2)

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FEB 5 - 2005
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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

PAUL D. CLEMENT
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In the Supreme Court of the United States

No. 04-975

KAREN LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner contends that his sentence under the federal Sentencing Guidelines was imposed in violation of the rule announced in *United States* v. *Booker*, No. 04-104 (Jan. 12, 2005), and *United States* v. *Fanfan*, No. 04-105 (Jan. 12, 2005). In *Booker* and *Fanfan*, this Court held that the Sixth Amendment, as construed in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), applies to the federal Sentencing Guidelines. *Booker*, slip op. 5-20 (Stevens, J., for the Court). In answering the remedial question in those cases, the Court then applied severability analysis and held that the Guidelines are advisory rather than mandatory, and that federal sentences are reviewable for reasonableness. *Booker*, slip op. 2-26 (Breyer, J., for the Court). Accordingly, the appropriate disposition is to grant certiorari, vacate the judgment of the court of appeals, and remand the case

for further consideration in light of *Booker* and *Fanfan*. The court of appeals can then decide what effect, if any, those decisions have on petitioner's sentence, taking into account any applicable doctrines of waiver, forfeiture, and harmless error.* See *id.* at 25-26.

PAUL D. CLEMENT
Acting Solicitor General

JANUARY 2005

* The government waives any further response to the petition unless the Court requests otherwise.